Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Commission's Forfeiture	)	CI Docket No. 95-6
Policy Statement and	)	
Amendment of Section 1.80	)	
of the Rules to Incorporate	)	
the Forfeiture Guidelines	)	

REPORT AND ORDER

Adopted: June 19, 1997 **Released: July 28, 1997**

By the Commission:

TABLE OF CONTENTS

I. INTRODUCTION

1. This Report and Order adopts an amendment to Section 1.80 of the Commission's Rules to add a note to this rule that incorporates guidelines for assessing forfeitures. By this rule making proceeding, we adopt, with revisions, the Forfeiture Policy Statement and guidelines that were vacated by the court's decision in United States Telephone Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) (USTA).[1]

II. BACKGROUND

2. In 1989, Congress amended the Communications Act of 1934 (the Act) to increase substantially the maximum dollar amounts for forfeitures that the Commission could impose under Section 503(b) and under other sections of the Act.[2] Specifically, Section 503 of the Act sets forth maximum forfeiture amounts for violations by licensees or regulatees in three categories: broadcasters and cable operators ("broadcast"), common carriers ("common carrier"), and other licensees, entities and members of the public that do not belong to the previous two categories ("other").[3] On August 1, 1991, the Commission released the Policy Statement,

[1] *Policy Statement, Standards For Assessing Forfeitures*, 6 FCC Rcd 4694 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993), *vacated, United States Telephone Association v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994) (*Forfeiture Policy Statement*). The *Forfeiture Policy Statement* as ultimately revised did not address forfeitures assessed against broadcast licensees for violation of the Commission's Equal Employment Opportunity (EEO) rules. Violations of the Commission's EEO rules were addressed in a subsequent Commission Policy Statement. *See In the Matter of Implementation of Commission's Equal Employment Opportunity Rules*, 9 FCC Rcd 6276 (1994) (*EEO Policy Statement*). We note, however, that the guidelines for EEO forfeitures were also affected by the court's decision in *USTA*, and we subsequently vacated the *EEO Policy Statement*. We are addressing our EEO guidelines in a separate proceeding. *Streamlining Broadcast EEO Rules and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules To Include EEO Forfeiture Guidelines, Order and Notice of Proposed Rule Making*, 11 FCC Rcd 5154 (1996).

[2] Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989) (amending 47 U.S.C. §§ 202(c), 203(e), 205(b), 214(d), 219(b), 220(d), 362, 386, 503(b)).

[3] Specifically, Section 503(b)(2)(A) provides for forfeitures up to $25,000 for each violation or a maximum of $250,000 for each continuing violation by any broadcast station licensee or permittee, cable television operator or applicant for any broadcast or cable television operator license, permit, certificate, or similar instrument; Section 503(b)(2)(B) provides for forfeitures up to $100,000 for each violation or a maximum of $1,000,000 for each continuing violation by common carriers or an applicant for any common carrier license, permit, certificate or similar instrument; and Section 503(b)(2)(C) provides for forfeiture penalties up to $10,000 for each violation or a maximum of $75,000 for each continuing violation by any subject violator not covered in subparagraph (A) or (B). 47 U.S.C. § 503(b)(2)(A)-(C). We note that the Debt Collection Improvement Act of 1996 (DCIA), Pub. L. No. 104-134, § 31001, 110 Stat. 1321 (1996), requires that civil monetary penalties assessed by the federal government, whether set by statutory maxima or specific dollar amounts as provided by federal law, be adjusted for inflation based on the formula outlined in the DCIA. Thus, the statutory maxima pursuant to Section 503(b)(2)(A) increase from $25,000 to $27,000 and from $250,000 to $275,000. The statutory maxima pursuant to Section 503(b)(2)(B) increase from $100,000 and $1,000,000 to $110,000 and $1,100,000 respectively. Lastly, the statutory maxima pursuant to Section 503(b)(2)(C) increase from $10,000 and $75,000 to $11,000 and $82,500, respectively. The increased statutory

Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991) (Policy Statement), to assist both the Commission and licensees in adjusting to the statutory increases. Prior to the statutory increases, the Commission determined forfeiture amounts on a case-by-case basis using relevant precedent. The Policy Statement modified this approach by establishing base forfeiture amounts for a wide range of violations. The base forfeiture amount for each type of violation was calculated as a percentage of the statutory maximum for the service involved for each violation or each day of a continuing violation as set forth in Section 503(b). The guidelines further provided that the base forfeiture amount could be increased or decreased by the adjustment criteria that corresponded to the statutory factors that the Commission is required to consider in assessing a monetary forfeiture penalty. 47 U.S.C. § 503(b)(2)(D).[4] To determine the degree of the upward or downward adjustment, the guidelines recommended percentage ranges for each adjustment criterion.

3. On reconsideration, petitioners argued that the Policy Statement was invalid because it was a substantive rule adopted without notice and comment rule making procedures required by the Administrative Procedure Act and not a general statement of policy. See 5 U.S.C. § 553. The Commission disagreed, noting that the Policy Statement expressly stated that the Commission retained discretion in individual cases and did not consider the Policy Statement a binding rule. Policy Statement Reconsideration Order, 7 FCC Rcd 5339 (1992), denying reconsideration of 6 FCC Rcd 4695 (1991). In 1993, after reviewing how the Policy Statement functioned in practice, the Commission made several modifications to the Policy Statement to ensure both consistency and flexibility in applying the forfeiture amounts and adjustment criteria in individual cases. Again the Commission reiterated that it retained discretion to deviate from the guidelines in specific cases. 1993 Policy Statement, 8 FCC Rcd 6215 (1993), (1993 Policy Statement). In 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the Policy Statement (including the reconsideration order and 1993 Policy Statement), on the ground that it was a rule promulgated without notice and comment and therefore invalid. United States Telephone Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994). Following the court's decision, the Commission and its staff returned to determining forfeiture amounts on a case-by-case basis, using the statutory factors set forth in Section 503(b) of the Act.

4. In the Notice of Proposed Rule Making (NPRM),[5] we followed the court's requirement that the Commission's forfeiture policy statement be put out for notice and comment. We proposed to adopt the same forfeiture guidelines set out in the original Policy Statement, but requested comments on all aspects of that proposal. In addition, we requested specific comment

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maxima became effective on March 5, 1997.

[4] Section 503(b)(2)(D) requires the Commission to "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503 (b)(2)(D).

[5] *In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 10 FCC Rcd 2945 (1995).*

on the following issues:

A. Whether the Commission should use guidelines to assess forfeitures instead of the traditional case-by-case approach;

B. Whether the guidelines proposed in the notice of proposed rule making should be modified;

C. Whether adjustment factor ranges should be adopted.

Additionally, we sought comment on our proposal to apply any newly adopted Forfeiture Policy Statement and guidelines to all pending forfeiture proceedings which were initiated after the effective date of the Forfeiture Policy Statement. We received a total of 17 comments, 1 informal comment, and 8 reply comments in response to the NPRM.[6]

III. DISCUSSION

A. Forfeiture versus the traditional case-by-case approach

5. In general, most commenters supported the concept of a guideline-based forfeiture system rather than a case-by-case approach in assessing forfeitures. Ten commenters and one reply commenter explicitly or generally supported the concept of a guideline-based forfeiture system: ARRL at 9-11; Bell Atlantic at 4; MCI at 1; USTA at 1; Infinity at 2; MariTEL at 5; PageNet at 7-10; AMTA at 3; PCIA at 1; Southwestern Bell at 2; Motorola at 1. In particular, MCI Telecommunications Corporation (MCI) noted that a schedule of fines with discretionary adjustment ranges should translate into public benefit through fair and prompt resolutions of violations. MCI Comments, 1. The United States Telephone Association (USTA) also indicated that forfeiture guidelines can contain information that may deter violations of important rules and assist the Commission in developing priorities among different violations. USTA Comments, 2. One commenter supported the case-by-case approach simply because it believed the Commission could not oversee a procedure that encompassed both flexible guidelines and staff discretion. Brown and Schwaninger Comments, 2. Three commenters raised specific concerns about the

[6] Comments were filed by: American Mobile Telecommunications Association, Incorporated (AMTA); American Radio Relay League (ARRL); Bell Atlantic Telephone Companies (including Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.)(Bell Atlantic); Brown and Schwaninger; Emery Telephone, Harrisonville Telephone Company, and Mobile Phone of Texas, Incorporated (jointly referred to herein as Emery *et al*); Infinity Broadcasting Corporation (Infinity); MCI Telecommunications Corporation (MCI); MobileMedia Communications, Incorporated (MobileMedia); National Association of Broadcasters (NAB); Paging Network, Incorporated (PageNet); Personal Communications Industry Association (PCIA); San Bernardino Coalition of Low Power FM Broadcasting (San Bernardino); Southwestern Bell Telephone Company (Southwestern Bell); United States Telephone Association (USTA); and WGJMariTEL Corporation (MariTEL). A late filed letter was received from William Dougan (Dougan), and we have treated Mr. Dougan's views as an informal comment. Reply comments were filed by: AMTA; MCI; Motorola Incorporated (Motorola); National Telephone Cooperative Association (NTCA); PCIA; San Bernardino; Southwestern Bell; and USTA.

potential adverse effect that the guidelines may have on businesses and their goal to provide universal services, and claimed that forfeiture guidelines would thus be inconsistent with Section 303(r) of the Act, 47 U.S.C. § 303(r), which provides the Commission with broad rule making authority to further the public interest, convenience and necessity. Emery et al.[7] at 6. Emery et al. suggest that the Commission not proceed with this rule making because the Republican Party's "Contract with America" imposes a moratorium on all rule making. Thus, Emery et al. contend that the issuance of any rules would be invalid and contrary to the express wishes of Congress. See Emery Comments, 9. An informal commenter, Mr. William L. Dougan, stated that the guidelines and forfeitures violate the United States Constitution because he cannot get a license for low power operation on FM frequencies. Letter from William Dougan to Secretary, FCC, April 4, 1995, at 1- 2. San Bernardino Coalition of Low Power FM Broadcasting (San Bernardino), which also favors a registration program. See San Bernardino Reply Comments, para. 14.

6. We have considered the specific concerns raised by some of the commenters regarding the Commission's exercise of its discretion under a guideline-based system. We are satisfied that our procedures, as set out in paragraphs 25 and 26, will allow the Commission to apply its guidelines in a consistent and fairly uniform manner, while retaining discretion to look at the individual facts and circumstances surrounding a particular violation. We have also addressed the concerns raised by Emery et al. regarding the effects of the proposed base forfeiture amounts on the provision of universal services. We have devised a forfeiture policy that does not make any distinctions among the various common carriers (see discussion in paragraphs 13, 14 and 15). Specifically, the procedures set out in paragraph 25 are sufficient to provide the subject of an NAL with consideration of any mitigating factors that should be considered prior to imposition of a final forfeiture. We also do not believe our forfeiture guidelines will undercut universal service objectives of the Act. We also note that the moratorium mentioned by Emery et al. was not enacted into law. With respect to the concerns raised by Emery et al. however, we note that Congress enacted legislation that provides an opportunity for Congressional review of all major rules promulgated by agencies. The Contract with America Advancement Act of 1996, Pub. L. No. 104-121 § 110 Stat. 847 (1996).

7. We reject the constitutional objections to the guidelines or to the adoption of any policy statement as raised by Mr. Dougan or San Bernardino. The Commission may, consistent with the First Amendment, impose forfeiture penalties for violations of its licensing rules, even when its licensing scheme does not provide for certain types of transmissions. See National Broadcasting Co. v. United States, 319 U.S. 190, 209-217 (1943).

8. We therefore agree with the commenters that adoption of forfeiture guidelines is warranted. Guidelines will provide the needed measure of predictability to the process and

[7] Inasmuch as the text of the comments submitted individually by Emery Telephone, Harrisonville Telephone, and Mobile Phone of Texas are identical, we will hereafter refer to these comments as the comments of Emery *et al.*

uniformity to our administrative sanctions while retaining flexibility for the Commission to act appropriately in particular cases. For this purpose, we hereby adopt a base forfeiture amount structure that will serve as a guideline for determining forfeiture liability amounts for specific violations of the Act and the Commission's Rules. As was our intent with the prior Policy Statement, these guidelines will not be binding on the Commission, the staff or the public. We retain discretion to take action in specific cases as warranted.

B. Proposal Modifications

9. Many commenters concluded that, although guidelines are beneficial to the forfeiture process, the guidelines as proposed were not rational and equitable.[8] The National Association of Broadcasters (NAB) along with several common carriers, both wireline and wireless, including MCI, Southwestern Bell Telephone Company (Southwestern Bell), MobileMedia Communications Incorporated (MobileMedia), USTA, Personal Communications Industries Association (PCIA), WJGMariTEL Corporation (MariTEL), and Paging Network (PageNet), urged the Commission to consider modification of the vacated schedule of forfeitures.[9] Commenters further contended that many of the assumptions underlying the forfeiture guidelines are outdated. For example, MobileMedia stated that a Further NPRM was needed because Commercial Mobile Radio Service (CMRS) licensees and Personal Communication Service (PCS) licensees were not in existence when Congress increased the statutory forfeiture amounts and were not mentioned by the Commission in the instant NPRM. MobileMedia Comments, 2-3.

10. American Mobile Telecommunications Association, Incorporated (AMTA), echoing comments submitted by Southwestern Bell, noted that as "service offerings merge among various classes of licensees, these widely-differing base amounts no longer make regulatory sense, nor do they reflect the Commission's goal of regulatory parity."[10] In the face of convergence of the cable TV and telephone industries,[11] Bell Atlantic contended that "[a]s competition among the various industries accelerates, the legal requirements of providing balanced incentives coincide to dictate that the penalties be set based on the nature of the offense, and not the identity of the transgressor." Bell Atlantic Comments, 3-4. In addition, commenters urged the Commission to consider new ways to implement a policy rather than merely proposing the same guidelines that the court rejected. In implementing any guidelines, commenters asked the Commission to address

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[8] USTA Comments, 1; San Bernardino Comments, 1; Emery Comments, 2; MobileMedia Comments, 5; PageNet Comments, 2-3; NTCA Reply Comments, 3.

[9] NAB Comments, 5; MobileMedia Comments, 3-4; MCI Reply Comments, 1; MariTEL Comments, 4; Southwestern Bell Comments (generally); USTA Comments (generally); PCIA Comments (generally).

[10] AMTA Reply Comments, 4. Southwestern Bell argued that the Commission has no reasonable basis for the disparate treatment it proposes "in the face of rapidly converging industries, e.g. cable and telephone." *See* Southwestern Bell Comments, 3.

[11] In support, Bell Atlantic cites *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992-Rate Regulation*, 9 FCC Rcd 4119, para. 24 (1994).

or clarify how the guidelines affect issues such as the use of different base amounts for similar violations in different services,[12] the use of different statutory maxima to justify different base amounts,[13] the use of upward and downward adjustment factors,[14] the method for ascertaining ability to pay a forfeiture, and the weight to be given to a previous violation in subsequent enforcement or transactional proceedings involving the same licensee. [15]

11. Inasmuch as the NPRM in this proceeding asked for comments on all aspects of the Commission's forfeiture policy, including the "other" category, and given that CMRS and PCS are both common carrier services, we believe that a Further NPRM concerning the need to include new services is unnecessary.[16] Upon review, however, we are persuaded that the guidelines should be revised. The following paragraphs discuss the two main revisions that we have made to the proposed guidelines and the reasons for these revisions.

i. Use of the same base forfeiture amount for similar violations in different services.

12. Most commenters objected to the proposed system of imposing different base forfeiture amounts for similar violations depending upon the service provided by the violator.[17] They argued this structure was arbitrary because the Forfeiture Policy Statement failed to provide an explanation for the different base forfeiture amounts.[18] USTA pointed out that the court found that the Commission did not provide any rationale for this action.[19] Other commenters pointed out that the availability of mitigating factors did not remedy the Commission's error in not providing a reasoned analysis for the different base forfeiture amounts among services. See, e.g., Emery Comments, 17; USTA Comments, 4, n. 3. They also argued that neither the language of the 1989 statutory amendment nor its legislative history provided support for the Commission's action establishing different base forfeiture amounts for each service, or higher base forfeiture

[12] *See e.g.*, Bell Atlantic Comments, 2-3; Emery Comments, 18; PCIA Comments, 4-5.

[13] *E.g.*, Bell Atlantic Comments, 2-3; USTA Comments, 2; Emery Comments, 13-15, 20.

[14] *E.g.*, NAB Comments, 7-9; PageNet Comments, 8.

[15] Infinity Comments, 2-8.

[16] *See e.g., Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (1996).

[17] *See* MobileMedia Comments, 4; MCI Reply Comments, 2; USTA Comments, 2; Bell Atlantic Comments, 2-3; Infinity Comments, 2; Emery Comments, 18; PCIA Comments, 1; NTCA Reply Comments, 4; PageNet Comments, 2; Southwestern Bell Comments, 3.

[18] MCI Reply Comments, 1; USTA Comments, 1-2; Infinity Comments, 2; Bell Atlantic Comments, 2; MobileMedia Comments, 4-5; Southwestern Bell Comments, 2; NTCA Reply Comments, 3. Entities such as the PCIA Reply Comments, 3, agreed with Emery Comments, 16.

[19] USTA Comments at 5.

amounts when the violation occurs in a service that has a higher maximum. Commenters argued that in setting different forfeiture amounts based on the identity of the violator rather than the nature of the violation, the Commission violated basic and fundamental principles of regulatory parity. See e.g., MCI Comments, 3. Several commenters also pointed out that, with upcoming changes in ownership rules and the technical and legal ability of different licensees to provide the same type of communication service, implementing different base amounts as proposed would result in dissimilar forfeiture amounts for similar violations based solely on the identity of the licensee providing the service. PageNet Comments, 2-3; Southwestern Bell Telephone Company (Southwestern Bell) Comments, 3; Bell Atlantic Comments, 3-4. Bell Atlantic argued that, contrary to the Commission's assertions in the NPRM, adoption of the forfeiture schedule as proposed would not "allow for comparable treatment of similarly situated offenders," but would levy forfeitures against common carriers that are four times the amount levied against broadcast or cable TV companies for the same or similar violations. Bell Atlantic Comments, 2-3.

13. Some common carriers, including commercial mobile radio service providers argued that the Commission has no basis for imposing higher forfeitures for common carrier violations.[20] Emery et al. argued that the 1989 statutory change only creates a higher statutory maximum for common carriers, and no legislative history or language in the statute supports the Commission's proposal that common carriers be treated more severely than broadcasters. They also contended that adoption of a forfeiture policy which made no distinctions between large and small common carriers would also violate the Commission's mandate and fundamental purpose as stated in Section 1 of the Act: to promote communications services and competition.[21]

14. In light of the problems outlined, most of the commenters suggested that the Commission implement a uniform forfeiture system, imposing fines according to the nature of the violation rather than the type of violator. In the alternative, if the guidelines must be based on the type of violator as well as the nature of the violation, several commenters propose that the Commission make distinctions among the types of violators (e.g., large common carriers versus small CMRS) within a group of licensees that provides the same type of communication service.[22] Some commenters suggested that the guidelines be based on the degree of injury or harm rather than a percentage of the maximum amount. Emery et al., for example, urged the Commission to look at the various approaches it took prior to implementing the Forfeiture Policy Statement. It argued that the amounts imposed were more reasonable because less serious violations were assessed on a flat-rate approach and serious violations involving aggravating circumstances were assessed the per diem statutory maximum, which was then no more than

[20] PCIA Comments, 5, and Reply Comments, 2; Emery Comments, 13-15, 20.

[21] Emery *et al.* contend that the only logical explanation for approving a higher statutory maximum may have been to deter "those very few common carriers (such as AT&T and MCI) that have such high earnings." These commenters, however, stated that even the largest carriers should not be fined at the high percentages unless aggravating circumstances exist. Emery Comments, 20.

[22] *See e.g.*, PCIA Reply Comments, 3; PageNet Comments, 4-5; and AMTA Comments, 4-5.

$2,000. [23] Two commenters even suggested that one base amount be used for all violations, as was done with tower lighting and marking violations. [24]

15. While we continue to believe that our prior approach was lawful, we have determined that it would be a fairer approach for the forfeiture guidelines to adopt uniform base forfeiture amounts for similar violations regardless of the nature of the service involved. We believe that this decision is fully supported by the record established by the commenters, and will result in a generally fairer approach to forfeiture proceedings in most cases.

16. Our decision reflects consideration of the issues of fair treatment raised by several commenters. First, we reviewed the recommendation made by several commenters that CMRS and other services not mentioned in the original Policy Statement be treated in the "other" category rather than in the "common carrier" category.[25] Although Section 332 provides that CMRS licensees are common carriers under the Act,[26] these commenters argued that it is unfair to now impose higher base forfeiture amounts when these entities would receive smaller fines under the earlier Policy Statement as private carriers that were in the "other" category. MariTEL Comments, 3. Alternatively, if the Commission does not treat them as belonging to the "other" category, CMRS commenters argued that a new category should be created for these services. We find this argument unpersuasive. Section 332(c)(1) requires that CMRS providers will be treated as common carriers for purposes of the Act.[27] Accordingly, CMRS providers will be treated as common carriers for purposes of Section 503 of the Act and our forfeiture guidelines. As a second issue of fair treatment raised in this proceeding, PageNet contends that the proposed forfeitures did not address the discriminatory effect that would result against Radio Common Carrier (RCC) paging carriers because they are licensed on a transmitter basis rather than a market basis as are Personal Communications Service (PCS) licensees. PageNet Comments, 2. We believe, however, that this concern relates to licensing procedures that are not within the scope of this rule making proceeding.

17. We recognize that Congress established different statutory maxima for broadcasters and for common carriers than for other persons who violate our rules. We believe this permits, but does not require, a forfeiture schedule that distinguishes among these categories of entities. As discussed below (see para. 24), however, we believe that there are better ways to achieve Congress's explicit intention that forfeitures serve as "a meaningful sanction to the wrongdoers and an effective deterrent to others." see Omnibus Budget Reconciliation Act of 1989, H.R. Conf.

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[23] Emery Comments, 10-11.

[24] *See* USTA Comments, 6; MCI Reply Comments, 2.

[25] MobileMedia Comments, 3; MariTEL Comments, 4; Emery Comments, 20, 24.

[26] See 47 U.S.C. § 332.

[27] 47 U.S.C. § 332(c)(1).

Rep. 386, 101st Cong., 1st Sess., 434 (1989).

ii. Revisions to the proposed base forfeiture amounts.

18. The majority of commenters took issue with the base forfeiture amounts. Some commenters suggested that the amounts proposed for each violation were unreasonably high, did not deter violations, evidenced a punitive rather than a remedial purpose, and only served to hinder entities who were often unaware of the regulatory requirements.[28] In particular, Emery et. al. argued that the proposed base forfeiture amounts of 40-80 percent of the statutory maxima were contrary to the Commission's history of assessing reasonable forfeitures to ensure substantial compliance by licensees and therefore, the amounts should be reduced. In support, they noted that common carrier forfeitures issued before the statutory increase were seldom more than 25 percent of the maximum, and that forfeitures assessed after the statutory increase but before the implementation of the prior policy statement were no more than 0.5 percent of the new one million dollar maximum. Emery Comments, 11-12. NAB and MCI also agreed that the base amounts suggested in the proposed forfeiture guidelines were too high and should be reduced by 50 percent with the exception of tower safety violations. NAB Comments, 5; MCI Reply Comments, 3.

19. The legislative history of Section 503 of the Act demonstrates that, Congress recognized the need to authorize the Commission to impose forfeitures sufficiently high to deter violations and constitute a meaningful sanction when violations occur. Specifically, in 1978, Congress increased the Commission's forfeiture authority, stating:

> The maximum amount of forfeitures permitted for single and multiple violations is unrealistically low to be an effective deterrent for highly profitable communications entities or to provide sufficient penalty to warrant the Attorney General's or the various U.S. district attorneys' attention for prosecuting forfeitures within the Federal district courts.

Sen. Rep. No. 580, 95th Cong. 1st Sess. 3 (1978), reprinted in 1978 U.S.C.C.A.N. 109, 111. Similarly, in 1989, Congress further increased the Commission's forfeiture authority stating its intent that forfeitures "serve as both a meaningful sanction to the wrongdoers and a deterrent to others." See H.R. Conf. Rep. 386, at 434 (1989). We believe that the increases in our forfeiture authority as well as the accompanying legislative history of our forfeiture authority support our determination that forfeiture amounts should be set high enough to serve as a deterrent and foster compliance with our rules.

20. As noted before, however, we have also determined that the guidelines for base

[28] MCI Comments, 1-2; Reply Comments, 3 (agreeing with Emery *et al* that the forfeiture amounts are too high, Emery Comments, 10-14, 16-17); Emery Comments, 10 (should be remedial and not punitive); NAB Comments, 6; USTA Comments, 3, 5; AMTA Reply Comments, 4-5.

forfeitures adopted here will not reflect distinctions based on the traditional classification of broadcast, common carrier, and other services. Consistent with our policy of protecting the public and ensuring the availability of reliable, affordable communications, we based the guidelines on the degree of harm or potential for harm that may arise from the violation. Thus, the dollar amount for the violation, regardless of service, generally starts at the same amount. Our experience in assessing forfeitures, however, has shown that although the type of violation is the same, each case will present its own unique facts. In particular, the identity of the licensee or the nature of the service are not wholly irrelevant to a determination of the seriousness of the harm. We cannot, for example, say that the degree of harm resulting from a violation of operating power limits committed by a full power broadcast station is identical to the degree of harm resulting from the same violation by an amateur radio operator. Nor can we conclude that the prospect of a $10,000 forfeiture for a particular offense will have the same deterrent effect on a small computer vendor, a moderately-sized radio common carrier, and a $10 billion per year local telephone company or interexchange carrier. Accordingly, as discussed below, we will use the adjustment factors to assess the forfeiture amount in light of all relevant facts.

21. In order to develop base amounts that could apply to all services, we concluded that the uniform base amounts could not be higher than the statutory maxima for any service. Inasmuch as the statutory maxima for broadcast, cable and common carrier are higher than for the remaining services, the statutory maxima for services other than broadcast, cable and common carrier was used as the common denominator. Thus, the uniform base forfeiture amounts generally adhere to the higher end of the statutory maximum of $10,000, which is the maximum forfeiture amount per violation that may be assessed against entities that are not classified as broadcasters, cable operators, or common carriers.[29] Consistent with these parameters, the uniform base forfeiture amounts adopted here and set forth in Appendix A reflect reductions in most of the forfeiture amounts that were proposed in the NPRM. We have made, however, two exceptions to our determination to use the $10,000 statutory maximum as a basis for establishing uniform base forfeiture amounts. First, we have set the base forfeiture amount for misrepresentation at the statutory maximum for the particular type of service provided by the violator. Regardless of the factual circumstances of each case, misrepresentation to the Commission always is an egregious violation. Any entity or individual that engages in this type of behavior should expect to pay the highest forfeiture applicable to the service at issue. Indeed, the revocation of the license may well also result from misrepresentation. 47 U.S.C. § 312(a)(1). Second, we have made an exception for violations that are unique to a particular service. In establishing guidelines for base forfeiture amounts for these violations, we have used case precedent developed by the Commission since the Court vacated the Policy Statement and, where no precedent exists, we have determined base amounts that reflect the level of egregiousness, based on the degree of harm, that we attach to the particular violation.

22. We believe it is important to make the following general observations about the

[29] We note that the statutory maxima for monetary forfeiture penalties were upwardly adjusted for inflation, effective March 5, 1997. *See* note 3, *infra.*

base forfeiture amounts adopted here. First, any omission of a specific rule violation from the list set forth in Appendix A should not signal that the Commission considers any unlisted violation as nonexistent or unimportant. The Commission expects, and it is each licensee's obligation, to know and comply with all of the Commission's rules. Indeed, we believe that the rigorous enforcement of the minimum regulatory requirements resulting from the recent amendments to the Communications Act will become critical to the preservation of the open competitive markets that the recent amendments seek to create. [30] Although we have adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, we retain our discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under our general forfeiture authority contained in Section 503 of the Act. See para. 24 infra.

23. Second, we note that the base forfeiture amounts set forth in Appendix A may appear high for entities that fall within the statutory classification of "other," for whom the statutory maximum is $10,000 per violation. In other words, base forfeiture amounts are indeed very close to the maximum forfeiture that may be assessed against these entities. We believe, however, that the system of uniform base forfeiture amounts can be applied in a fair and equitable manner, with respect to all licensees, permittees, regulatees, and members of the public. Under the Act, many of the services in the "other" category, e.g., citizen band (CB) radio, domestic ship radios and aircraft radios are licensed by rule. See Section 307(e)(1) of the Communications Act of 1934, 47 U.S.C. § 307(e)(1). See also Section 403 of the Telecommunications Act of 1996, Pub. L. No. 104 -104, 110 Stat. 56 (1996). Except for egregious violations, it has been our general practice to issue warnings to first time violators who are not licensed on an individual basis. Thus, this type of violator would receive a forfeiture only after it has violated the Act or rules despite the prior warning. We believe that the continuation of this practice of warnings to entities licensed by rule, except in egregious cases involving harm to others or safety of life issues, decreases any adverse impact that the adopted base forfeiture amounts may have on these entities.

24. Third, on the other end of the spectrum of potential violators, we recognize that for large or highly profitable communications entities, the base forfeiture amounts set forth in Appendix A are generally low. In this regard, we are mindful that, as Congress has stated, for a forfeiture to be an effective deterrent against these entities, the forfeiture must be issued at a high level. See para. 19, supra. For this reason, we caution all entities and individuals that, independent from the uniform base forfeiture amounts set forth in Appendix A, and pursuant to Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), we intend to take into account the subject violator's ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business. Such large or highly profitable entities should expect in this

[30] *See generally,* Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward,* 7 Yale J. on Reg. 325, 329-30 (1990) (explaining that, as direct economic regulation is abolished, the government's role in preserving competition will necessarily increase).

regard that the forfeiture amount set out in a Notice of Apparent Liability against them may in many cases be above, or even well above, the relevant base amount.

C. Adjustment Factors Percentage Ranges

25. Several commenters[31] also took issue with the Commission's guidelines for applying upward and downward adjustment factors in determining a reasonable forfeiture amount. They contended that under the vacated guidelines, violations were seldom considered "minor violations" that would require reductions of 50 percent to 90 percent of the base amount and reductions were, therefore, illusory. For example, NAB indicated that a downward adjustment for a minor violation should apply when a rule encompasses multiple requirements, for example, maintaining all necessary records in the "public files", 47 C.F.R. § 73.1212. NAB Comments, 6-7. Additionally, some commenters contended that forfeitures should be upwardly adjusted only when the violator knows that it has deliberately violated the Commission's rules. See e.g., PageNet Comments, 8.

26. We agree with the commenters that there were difficulties associated with applying the adjustment factor ranges. Although the percentage ranges were designed as guidelines for adjusting the forfeiture based on the statutory criteria, the ranges still afforded the Commission and its Bureaus and Offices wide discretion to apply a specific percentage within the particular range at issue. To reflect more clearly the Commission's discretion to increase or reduce a forfeiture penalty as much as warranted based on the unique facts of each case, we have determined that the percentage ranges for the upward and downward adjustment factors should be eliminated. Thus, the Forfeiture Policy Statement and forfeiture guidelines that we adopt herein no longer provide percentage ranges for the adjustment factors outlined in Section 503 of the Act. (We are also eliminating the percentage ranges for the statutory forfeitures that are not assessed pursuant to Section 503 of the Act, see 47 U.S.C. §§ 202(c), 203(e), 205(b), 214(d), 219(b), 220(d), 223, 364, 386, 506, 554. This means that the Commission will initially assess these violations at the statutory amount, but can adjust downward based on the adjustment factors set out in Section 503 and the facts of the case.)

27. Although we are eliminating the percentage ranges, we are required by statute to consider various adjustment criteria before determining a forfeiture amount in each case. The adjustment criteria listed in Appendix A of the guidelines reflect the factors outlined in the statute. For example, the statute requires that we consider the "nature, circumstances, extent and gravity of the violation". Thus, the adjustment factors regarding the severity of the violation that may increase or decrease the forfeiture are: substantial harm, repeated or continuous violation, or substantial or economic gain derived from the violation, and the minor nature of the violation. The statute also requires that "with respect to the violator," we consider factors such as "the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." Accordingly, the adjustment factors we evaluate in considering the actions

[31] Emery Comments, 17-18; NAB Comments, 6-8; PageNet Comments, 8; MCI Reply Comments, 3-4.

of the violator include egregious misconduct, ability or inability to pay, intentional violation, prior violation of same or other requirements, good faith or voluntary disclosure, and history of overall compliance. 47 U.S.C. § 503(b)(2)(D). In sum, although the base amount is the starting point in assessing a forfeiture, the forfeiture may be decreased below the base amount or increased to the statutory maximum when the adjustment criteria are considered based on the facts of the case.

D. Other Issues

28. Discretion to depart from forfeiture guidelines. We sought comment on whether the Commission should retain discretion to depart from the guidelines in appropriate circumstances or, in the alternative, adopt the guidelines as a binding rule. Both USTA and Brown and Schwaninger indicated that guidelines could not provide effective notice to licensees or result in administrative efficiency as stated in the NPRM if the Commission is free to exercise its discretion and deviate from those guidelines. USTA Comments, 6; Brown and Schwaninger Comments, 2. Brown and Schwaninger contended that the guideline system would, in effect, become a case-by-case system, by prompting violators to seek exemptions from the guidelines for lesser forfeiture penalties and would invite litigation in forfeitures assessed by staff discretion. Brown and Schwaninger Comments, 2.

29. We agree that the predictability in the forfeiture process[32] is an important objective and adherence to the guidelines is a method to achieve this goal. Because this is only a guideline and not a binding rule, however, the Commission retains its discretion to depart from the guidelines where appropriate. As for the concerns expressed by the Commenters that the Commission's exercise of discretion will invite litigation, we note that regardless of which method is used to assess the forfeiture, parties who are dissatisfied with the process have always had the right to seek reconsideration of a forfeiture penalty before the Commission. Moreover, in a case initiated by a Notice of Apparent Liability, the party ultimately may be heard in a trial de novo in a district court of appropriate jurisdiction.

30. Use of warnings for first time violations. Some commenters suggested that the Commission adopt new enforcement methods, including an increased use of warnings for first time or minor violations prior to issuance of forfeitures.[33] NAB, in particular, suggested that the

[32] In accord with its discretion, the Commission may initiate a forfeiture action by either issuing a Notice of Apparent Liability or a Notice of an Opportunity for Hearing, 47 C.F.R. § 1.80 (e). The Notice of Apparent Liability commences a hearing on the record in which the Commission's final order may be subject to a trial *de novo* in District Court, and handled by the Department of Justice. If a forfeiture, however, is initiated by a Notice of an Opportunity for Hearing, the decision of the administrative law judge (ALJ) or any Commission order affirming the ALJ decision that is not challenged by the appellate court constitutes a final Commission order enforced by the Department of Justice in an action in which the validity and appropriateness of the forfeiture is not subject to review. 47 C.F.R. § 1.80 (g)(2); *see 47 U.S.C. § 503(b)(3)(B).*

[33] NAB Comments, 9-11; MCI Reply Comments, 3- 4.

Commission's rule making proceeding should look into more effective methods to obtain compliance rather than "better ways to accomplish the goals of developing guidelines for determining forfeiture amounts." NAB Comments, 9.

31. As the NPRM noted, it was never our intention that the guidelines be read to require that a forfeiture be issued in every case or in any particular case. NPRM, at 2945. We agree that warnings can be an effective compliance tool in some cases involving minor or first time violations. The Commission has broad discretion to issue warnings in lieu of forfeitures. See 47 C.F.R. § 1.89. Nonetheless, an approach whereby, except in cases of harm to others or safety of life, we would always issue a warning to first-time violators would greatly undermine the credibility and effectiveness of our overall compliance efforts. Licensees must strive to comply with rules. Such an approach could invite some licensees to commit first-time violations with impunity. Thus, we will continue to determine whether to issue a warning or assess a forfeiture based on the nature and circumstances of the specific violation.

32. Use of the issuance of an unpaid NAL in subsequent proceedings. Several commenters stated that the Commission's proposed forfeiture guidelines did not indicate the purpose for which the Commission uses pending forfeitures against a violator in subsequent proceedings. Infinity Broadcasting Inc. (Infinity) argued that the use of a Notice of Apparent Liability (NAL) or an unpaid Notice of Forfeiture in a subsequent proceeding appeared to contravene Section 504(c), which prohibits the use of a non-final, non-adjudicated forfeiture proceeding in any other proceeding before the Commission, and also prohibits the use of the underlying facts of the violations to increase the amount of subsequent forfeitures. Infinity Comments, 5-7.[34] Comments from NAB and ARRL also raised this issue.

33. Section 504 of the Act provides, inter alia that:

> In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this Act, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order becomes final.

47 U.S.C. § 504 (c).

The legislative history of Section 504(c), however, indicates that the Commission may use the facts underlying a violation in a subsequent proceeding. Although the Senate Commerce Committee Report noted that the Commission could not use the pendency of a forfeiture action

[34] Specifically, Infinity says that, "[o]n its face, Section 504(c) precludes any Commission purported finding of, and reliance on, 'patterns' of *unadjudicated misconduct in the forfeiture context." Infinity Comments, 4 (quotations and emphasis in original). The plain statutory language, however, does not contain the words "patterns" or "misconduct."*

prior to final adjudication against a licensee, the report went on to say:

> [S]ubsection (c) . . . is not intended to mean that the facts upon which a notice of forfeiture liability against a licensee is based cannot be considered by the Commission in connection with an application for renewal of a license, for example, or with respect to the imposition of other sanctions authorized by the Communications Act of 1934 . . . . [F]acts going to the fitness of the licensee could be introduced in evidence against such licensee notwithstanding that such facts are the basis of an order of forfeiture.

S. Rep. No. 1857, 86th Cong., 2d Sess. 11 (1960).

34. We believe that we have faithfully implemented congressional intent in this area. Consistent with Section 504 of the Act, the Commission does not use the mere issuance or failure to pay an NAL to the prejudice of the subject. We reiterate here that we will not do so in the future unless the forfeiture penalty constitutes a final action: in other words, unless the forfeiture has been paid or finally adjudicated as stated in Section 504 of the Act. What the Commission has done in the past, and what we will continue to do where appropriate, is to use the facts underlying the prior violations that may have been the subject of an NAL. We are persuaded that using the underlying facts of a prior violation that shows a pattern of non-compliant behavior against a licensee in a subsequent renewal, forfeiture, transfer, or other proceeding does not cause the prejudice that Congress sought to avoid in Section 504(c).

35. The following example should provide guidance as to our use of facts underlying the issuance of an NAL. Assume that the Commission determined that a licensee violated the Commission's rules regarding permissible power on March 1, 1996, again on June 1, 1996, and again on October 1, 1996. Assume further that we then issue a $5,000 NAL for the March 1 violation and a second $5,000 NAL for the June 1 violation. In issuing an NAL for the October 1 violation, the Commission may well view the October 1 violation as repeated or part of a pattern of violations, in light of the earlier March 1 and June 1 violations. Thus, we may issue an NAL for $7,500 for the October 1 violation, citing the apparent March 1 and June 1 violations as a basis for a higher forfeiture. The NAL for the October 1 violation is not higher because of the two prior NALs or because the licensee has not paid the prior forfeitures, but rather because the underlying facts of the two prior apparent violations suggest egregious misbehavior by the licensee. The licensee will not be required to pay the $7,500 forfeiture without having an opportunity to present evidence before the Commission or in court that it did not commit the earlier violations. Obviously, if it were to convince the Commission or a court that it had not committed violations on March 1 and June 1, the licensee's forfeiture would be reduced by the Commission or the court for the October 1 violation (assuming it was proven to be a first time violation) to reflect the fact that it was not a repeated violation or part of a pattern of violations. The Commission would have complied with Section 504(c) because it would have used only the underlying facts, not the existence of prior NALs, against the licensee, and the licensee would have had the full opportunity to present appropriate evidence before having to pay any forfeiture.

36. Under this approach, the licensee is not being hurt in any way for its failure to pay the NAL. Moreover, the licensee will always have the opportunity to present evidence that the underlying facts relied on by the Commission did not constitute a violation, either by introducing evidence to that effect in a Commission hearing (e.g., renewal or transfer hearing) or in a court action to collect a subsequent forfeiture that is for a higher amount because of the earlier violations. See S. Rep. No. 1857. ("The licensee could not, therefore, complain of the introduction of such evidence so long as he has the right to cross-examine the witnesses introducing it and the further right to offer evidence to rebut it").

37. Specific rule violations. Several commenters raised concerns about the amounts proposed for specific violations. MCI, for example, urged that the amount of forfeitures charged for unauthorized conversions, known as "slamming" violations, should be reduced from the $75,000 proposed in the NPRM. MCI suggested that because these violations can easily result from human error, there should be a separate category of violations for "Failure to verify order to change long distance carrier." MCI argued that, although it is critical to deter fraudulent conversions, "it is important that the Commission not deter telemarketing invitations altogether." See MCI Comments, 1-2. NAB urged reductions in the amounts assessed for violations that involve multiple compliance factors (e.g., broadcast files where only a few documents may be missing). NAB proposed a provision that if a licensee violates only a portion of a rule, e.g., omits one document from the public file, the Commission will assess only a portion of the base forfeiture amount. NAB also sought "amnesty" from complying with the operator on duty and lottery broadcast requirements inasmuch as the Commission has initiated rule makings or made recommendations to Congress to eliminate these requirements. NAB also requested amnesty for Emergency Broadcast System/Emergency Alert System (EBS/EAS) violations during the transition period until all equipment has been converted. NAB Comments, 13-15. In addition, NAB urged that amnesty be offered for violations such as exceeding authorized antenna height, operation at an unauthorized location, and other tower related violations that do not pose safety threats. See NAB Comments, 11-12. Motorola agreed with NAB's amnesty proposal, and urged that the ultimate or primary burden for tower rules violations be placed on tower owners. Motorola Reply Comments, 2-3.

38. We agree with MCI that the forfeiture penalty amount proposed for unauthorized conversion of a consumer's primary interexchange carrier should be reduced. A review of the forfeitures issued for slamming violations since the USTA decision indicates that the Commission has generally assessed forfeitures at $40,000 for violations such as those in which fraud is an issue, or in cases where the carrier's deliberate failure to ensure that letters of authorization are valid and properly authorized rise to the level of gross negligence. See e.g., Excel Telecommunications, Inc., 11 FCC Rcd 19765 (1996), Long Distance Services, Inc., _ FCC Rcd _ (1997) DA 97-956 (released May 8, 1997). Accordingly, we are reducing the base amount for slamming to $40,000 rather than the $75,000 originally proposed in the NPRM.

39. Regarding NAB's contention that a violation should be reduced as minor when it is a partial violation of the rule, we note that the forfeiture guidelines we adopt today provide sufficient flexibility to allow for a forfeiture less than the base amount. In this regard, we

disagree with NAB's characterization that omission of the issue/program list from the public file is a minor violation; such a violation is serious in that it diminishes the public's ability to determine and comment at renewal time on whether the station is serving its community.[35] Nonetheless, even in these circumstances, we would always look to the facts surrounding any partial violation to determine if it warranted the base forfeiture amount or less. We reject NAB's proposal that we decline to issue forfeitures for violations of our operator on duty and lottery broadcast requirements. Unless Congress amends the Communications Act to deregulate the action in question, we will continue to issue forfeitures for this violation, as warranted in each case.[36] We note that NAB's arguments with respect to antenna tower violations have been largely rendered moot by the Commission's adoption of the Report and Order, Streamlining the Antenna Structure Clearance Procedure and Revision of the Rules Concerning Construction, Marking and Lighting of Antenna Structures, 11 FCC Rcd 4272 (1995). Under the new tower registration procedures adopted by the Commission, it is tower owners rather than licensees who will be primarily responsible for registering towers requiring marking and lighting under the Federal Aviation Administration guidelines. Further, in the antenna proceeding, the Commission also granted an amnesty period during which no forfeitures will be issued to licensees seeking to correct existing tower records.

40. With respect to violations for technical and equipment deficiencies resulting from changes from the EBS to the EAS, the request for amnesty is moot for broadcasters.[37] The issue of violation of the operator on duty rule is moot because the rule was eliminated by order released October 23, 1995. Amendment of Parts 73 and 74 of the Commission's Rules to Permit Unattended Operation of Broadcast Stations and to Update Broadcast Station Transmitter Control and Monitoring Requirements, 10 FCC Rcd 11479 (1995). As to other violations for which NAB seeks amnesty for licensees (e.g. operation at unauthorized location) we see no public interest basis for such action.

41. Clarification of certain terms. A few commenters urged clarification of the term "ability to pay" as an adjustment factor. Some commenters, echoing small carriers who argued that they should be guided by a different forfeiture scheme, noted that the Commission's apparent definition of "ability to pay" is limited to "gross revenues" and does not adequately consider that

[35] In fact, in recent changes to the Telecommunications Act, Congress increased the maximum permissible term of broadcast licenses and expedited license renewal procedures by limiting comparative renewal challenges. *See* Section 204, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[36] As part of the Commission's 1995 legislative package submitted to Congress in May 1995, the Commission recommended, *inter alia*, that Congress eliminate the prohibition against broadcasting lottery information. Congress took no action on this recommendation and no legislation on this issue is currently pending.

[37] NAB filed its comments on March 28, 1995, and the EBS/EAS deadline for broadcasters was July 1, 1995. The deadline for modification of all EBS decoding gear for broadcasters was extended by the Commission to January 1, 1997. *See Report and Order and Further Notice of Proposed Rule Making, Amendment of Part 73 Subpart G of the Commission's Rules Regarding the Emergency Broadcast System*, 10 FCC Rcd 1786 (1994), *aff'd Memorandum Opinion and Order*, 10 FCC Rcd 11494 (1995).

many carriers provide high-cost, high-maintenance, low-profit services to rural communities as "an adjunct" to other operations. For this reason, they note, the revenues from more profitable operations should not be considered when evaluating the carrier's ability to pay.[38]

42. These commenters also argued that the large forfeitures in some cases could be the equivalent of a license revocation. They argue that "ability to pay" is based on gross revenues and no consideration is given to operating or maintenance expenses. A company, they argue, may be considered profitable when in fact it is operating on the margin. The commenters contend that this approach to determining "ability to pay" contravenes the "universal service" mandate of Section 1 of the Act because it disproportionately injures businesses who provide service to rural or less profitable areas, and discourages diversity. In addition, the commenters argue that this approach to "ability to pay" erodes the protections otherwise given to small businesses in the Paperwork Reduction Act and the Regulatory Flexibility Act. They argued that smaller carriers that now provide high-cost, high-maintenance, low-profit services to rural communities, e.g., improved mobile telephone services (IMTS) or Basic Exchange Telecommunications Radio Service (BETRS), will be driven out of business if they must pay higher forfeitures than other licensees for similar violations. [39] Because these services are provided by carriers as "an adjunct" to its other operations, they argue that the Commission would consider the higher profits from their other operations and the forfeitures would not be reduced based on the subsidiary's ability to pay.

43. As the commenters noted, Commission cases point to gross revenues as the starting point for determining a party's ability to pay. In PJB Communications of Virginia, Inc., 7 FCC Rcd 2088 (1992) (PJB Communications), we stated:

> [i]n general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture. Nevertheless, we recognize that in some cases, other financial indicators, such as net losses, may also be relevant. If gross revenues are sufficiently great, however, the mere fact that a business is operating at a loss does not itself mean that it cannot afford to pay a forfeiture.

PJB Communications, At 2089. Thus, PJB Communications indicates that factors other than gross revenues may also be considered. Indeed, the Commission does not use a strict "gross revenues" standard. For example, the Commission has reduced a forfeiture to an amount adequate to deter future misconduct after consideration of the violators' unprofitable history, and the relative lower value of the licensed operation at issue. See e.g., First Greenville Corporation, 11 FCC Rcd 7399 (1996); Benito Rish, 10 FCC Rcd 2861 (1995) (profit and loss statement submitted to reflect inability to pay a forfeiture); see also Pinnacle Communications, Inc., 11 FCC

[38] See Brown and Schwaninger Comments, 3; AMTA Comments, 4-6.

[39] PCIA Comments, 3-5; Emery Comments, 4-6, 12-13.

Rcd 15496 (1996) (analysis of the balance sheet and the profit and loss statement accompanied by the licensee's certification focused on net liabilities in light of default of loan payment). Although forfeiture amounts will be initially assessed according to the violation, the Commission's staff reviews all responses to NALs that claim inability to pay a forfeiture on a case-by-case basis in accordance with Section 503(b)(2)(D) of the Act. In this respect, we do not believe that focusing on the payment of forfeiture will deter service to rural or less profitable areas, discourage diversity or otherwise operate inconsistently with the universal service goals of the Communications Act.

44. We are cognizant of the concerns raised by small entities as to the burden and expense of documenting inability to pay a forfeiture by means of audited financial statements. In this regard, we note that the Commission has the flexibility to consider any documentation, not just audited financial statements, that it considers probative, objective evidence of the violator's ability to pay a forfeiture. See 47 C.F.R. § 1.80 (f)(3)[40]. The Commission intends to continue its policy of being sensitive to concerns of small entities who may not have the ability to pay a particular forfeiture amount or the ability to submit the same kind of documentation to corroborate the inability to pay. This is consistent with section 503(b)(2)(D) of the Communications Act and section 1.80(b)(4) of our rules, which provides that the Commission will take into account ability to pay in assessing forfeitures, and with our longstanding case law.

45. American Mobile Telecommunications Association (AMTA) sought clarification of various violations listed in the proposed Forfeiture Policy Statement. AMTA contended that several of the listed violations overlap or are duplicative such as construction or operation without a license, using an unauthorized frequency, and construction or operation at an unauthorized location, and recommended that the Commission simplify the proposed types of violations relating to the actual operation of a station. In addition, AMTA indicated that, because the Commission's overall regulatory scheme is generally designed to prevent interference among entities, the Commission has failed to explain why operating without any license would be considered four times as egregious as operating at a location not covered by the authorization. Similarly, AMTA questioned why forfeitures for using unauthorized frequencies are lower than forfeitures for operating without a license, but higher than forfeitures for operating at the wrong location. AMTA noted that it is unclear which violations would be applicable to a specialized mobile radio (SMR) licensee authorized to operate in the Washington, D.C. area that initiated service in Annapolis, MD on different frequencies prior to the grant of an FCC authorization to do so. AMTA asserted that the severity of the forfeiture should be based on likelihood or actuality of causing interference to another licensee. AMTA believed that the Commission needs to distinguish clearly between essentially ministerial/administrative violations and those with the potential for disturbing or disabling the operations of other facilities (interference potential). AMTA Comments, 7-8.

[40] Section 1.80 of the Commission's rules states "[a]ny showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent. 47 C.F.R. § 1.80(f)(3).

46. As AMTA noted, one of the principal reasons for requiring an FCC license to broadcast is to prevent interference with broadcast signals so that such signals can be received by the public. In the absence of a scheme requiring a license before transmitting can commence, it is not clear how interference conflicts would be resolved. Such an approach would be costly, disruptive, inefficient, and directly contrary to the express will of Congress. See Turner Broadcasting System Inc. v. FCC, 114 S. Ct. 2445, 2456-57 (1994). Thus, ensuring that parties operate in accord with the license authorization is fundamental to successful implementation of our spectrum management objectives. Failure to receive authorization to transmit prior to transmission is not a mere ministerial oversight; it is an intentional disregard of the Commission's efforts to prevent interference. Thus, in AMTA's example about the SMR licensee, the party has engaged in unlicensed operation because, regardless of where it may properly transmit, it is transmitting from a location on a frequency prior to any Commission approval for that operation.

47. With respect to operating on an unauthorized frequency or unauthorized location, we note that frequency and location are very important to our spectrum management and interference prevention functions. These types of violations arise when a party seeks and receives an FCC license, but does not operate in full compliance with the authorization of license. Both scenarios involve operation under color of a license that creates a potential for interference or disruption of communications between licensed entities. Therefore, we agree with AMTA that the base forfeiture amount for each of these types of violations should be the same. We reiterate, however, that although we are using the same base forfeiture amount for these violations, the forfeiture amount may be affected by the severity of the interference and intentional nature of the violation, as well as all other adjustment factors.

48. Treatment of pending cases. NAB stated that the Commission should rescind any forfeiture imposed under the 1991 Policy Statement or 1993 Policy Statement that has not been paid. NAB Comments, 8. Infinity argued that forfeitures for violations prior to the effective date of any new policy statement should be based on case law decided under the statutory maximum in effect prior to changes in the statute in 1989.[41] Infinity Comments, 9 n. 8.

49. We reject these suggestions. Pursuant to Section 503 of the Act, the Commission has full authority to apply the increased statutory maximum in effect since 1989 and to adjust its policies and decisions in specific cases on an ongoing basis to take account of increased statutory amounts or changes in Commission enforcement priorities, regardless of the existence or non-existence of a forfeiture policy statement. All forfeitures assessed under the 1991 and 1993 Policy Statements conformed to the standards set out in Section 503 of the Act and, therefore, constitute the Commission's findings of liability for those violations. For these reasons, we will include recent case law in our analysis of pending cases. With respect to these pending proceedings, we will evaluate them under the case-by-case approach in effect when the violation

[41] Infinity cites to the now abolished Section 503(b)(E) of the Act for the proposition that the Communications Act limited indecency forfeitures to $1,000 per day. The $1,000 per day limit on forfeitures was raised to $2,000 in 1978 and, for broadcasters, to $25,000 in 1989.

occurred. We will also use the case-by-case approach for violations arising from facts that occurred before the effective date of this order but where the Commission will commence forfeiture action after the effective date.

E. Other Matters

50. In cases where the Commission designates forfeiture matters for hearing (e.g., as part of a license application, license revocation or license renewal proceeding), the Commission's typically indicates that the forfeiture liability amount may be assessed up to the relevant statutory maximum. See Ellwood Beach Broadcasting, Ltd., 8 FCC Rcd 453, 454 n. 5 (1993). In light of recent amendments to the Equal Access to Justice Act made as part of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), we will discontinue this practice. Instead, we will indicate an appropriate maximum forfeiture amount in light of the specific facts at issue when initiating such hearing cases effective immediately.

51. We note that Section 223 of the recently enacted Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), enacted as part of the Contract with American Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), requires agencies to establish a policy providing for the reduction and, under appropriate circumstances, the waiver of civil penalties imposed on small entities. As part of this policy, under appropriate circumstances, the agency may consider ability to pay in determining penalty assessments on small entities. Such circumstances may include, among others, violations discovered because the small entity participated in a compliance assistance or audit program, and good faith efforts demonstrated by the entity to comply with the law. Circumstances that may be excluded from the policy's applicability cover small entities that have been subject to multiple enforcement actions, willful or criminal violations, and violations that pose serious health, safety or environmental threats.

52. Our existing policies, as reflected in our precedent, and as retained here, comply with Section 223 of SBREFA. Warnings, rather than forfeitures, may continue to be appropriate in particular cases involving small businesses or others. See par. 31, supra. Under Section 503(b)(2)(D) of the Communications Act and section 1.80(b)(4) of our rules, we will continue to consider inability to pay a relevant factor in assessing forfeitures. See par. 44, supra. See also Appendix A, Section II, downward adjustment criterion (4). Our other upward and downward adjustment factors, which are reflective of existing policy, encompass many of the conditions and exclusions listed and Section 223 of SBREFA. See Appendix A, Section II. These factors will continue to be applied in cases of violations involving small entities (as well as others) to determine whether a waiver or reduction of a forfeiture is warranted.

IV. CONCLUSION

53. The forfeiture guidelines are intended as a guide for frequently recurring violations.

They are not intended to be a complete or exhaustive list of violations. Moreover, the guidelines do not apply to violations for which the forfeiture amounts are statutorily established. See para. 23, supra. The mitigating factors of Section 503(b)(2) (D) will, however, be used to make adjustments in all appropriate cases, as warranted. In addition, the fact that a particular violation is not listed on the forfeiture guidelines schedule should also not be taken to mean that the violation is unimportant or nonexistent. The Commission retains the discretion to impose forfeitures for other violations, including new violations of existing laws or regulations, or violations that arise from the use of new technologies or services.

V. ADMINISTRATIVE MATTERS

A. Final Regulatory Flexibility Analysis

54. Final Regulatory Flexibility Analysis: As required by Section 604 of the Regulatory Flexibility Act (RFA), the Commission prepared an Initial Regulatory Flexibility Analysis (IRFA) that was incorporated in the Notice of Proposed Rulemaking (NPRM).[42] The Commission sought written public comments on all the proposals in the NPRM, including the IRFA. Based on the analysis of the public comments, the Commission has prepared a final Regulatory Flexibility Analysis of the expected impact on small entities of the rule changes adopted in this Report and Order. The Final Regulatory Flexibility Analysis is discussed fully in Appendix C of this Report and Order.

B. Ex Parte Rules -- Permit-But-Disclose Proceeding

55. This is a permit-but-disclose notice and comment rule making proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided, they are disclosed as outlined in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

VI. ORDERING CLAUSES

56. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i), 303(r) and 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 503(b), Part 1, Subpart A, Section 1.80(b), 47 C.F.R. § 1.80(b), is amended to incorporate as a note the Commission's Forfeiture Policy Statement, and the Guidelines for Assessing Forfeitures set forth in Appendix A.

57. IT IS FURTHER ORDERED, that this Report and Order will be effective sixty (60) days after publication of a summary thereof in the Federal Register.

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[42] *In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to incorporate the Forfeiture Guidelines, 10 FCC Rcd 2945 (1995).*

58. IT IS FURTHER ORDERED, that a copy of the Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary